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No. 781

In the Supreme Court of the United States

OCTOBER TERM, 1960

VICTOR PANICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Case:

Santore, et al. v. *United States*, November 16, 1960 (C.A. 2), certiorari denied, Nos. 15, 16, 17, 648, 5 Misc., 6 Misc., 635 Misc., this Term, March 6, 1961 6

Statutes:

18 U.S.C. 2	6
18 U.S.C. 371	3
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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1961 (Pet. App. 16). The petition for a writ of certiorari was filed on March 4, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence showed sufficient possession of narcotics to support the statutory presumption of knowledge of illegal importation.

STATUTES INVOLVED

21 U.S.C. 173 provides, in pertinent part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

21 U.S.C. 174 provides, in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237

(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * *

STATEMENT

Petitioner was charged in two counts with unlawfully receiving, selling, concealing and facilitating the transportation of approximately one quarter of a kilo of heroin [1] and of conspiracy [2] (R. 35-37). He was convicted on both counts by a jury in the United States District Court for the Southern District of New York and was sentenced to concurrent terms of five years imprisonment (R. 1). The evidence may be summarized as follows:

1. On February 4, 1959, narcotics agent Brown met petitioner's codefendants, Altimari and Bonina, and arranged for the purchase of a quarter kilo of heroin. The price was to be $4,000, of which $3,500 would be paid upon delivery and $500 later. Delivery was to be made that evening at 10:00 o'clock at the Throggs Neck Recreation Center, a bar and bowling alley located in the Bronx (R. 40).

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[1] 21 U.S.C. 173, 174.

[2] 18 U.S.C. 371. Codefendants Altimari and Bonina had earlier pleaded guilty.

Five minutes before the appointed time, agent Murray drove past the center and observed the three defendants conversing together near the entrance. Murray parked his car farther down the street and then placed himself at a point in a cemetery directly opposite the center, where he observed the subsequent events through field glasses (R. 56-57). When Brown arrived, Altimari came over to the car and directed that it be parked in the adjoining parking lot. He and Bonina joined Brown in the parking lot, while petitioner remained in front of the center. Altimari returned to where petitioner was standing, was there a moment, and returned with a paper bag. He gave the bag (subsequently proved to contain the narcotics) to Brown and was paid the $3,500 (R. 38-44, 54, 57-58).

2. On the evening of February 19, Brown met Altimari and Bonina at the bar of the recreation center, where they introduced him to petitioner. Brown complained about the quality of the prior delivery and refused to commit himself about future purchases. He paid the $500 balance due on the other transaction to Altimari (R. 55-56).

On February 24, Brown met the three defendants. Petitioner asked him what he was going to do this time, to which Brown replied that he would take a quarter kilo. Petitioner said he did not think they could handle so little, that Brown would have to take a half kilo or better. They discussed prices and later petitioner told Brown that if he would take a half kilo for $8,000, petitioner would personally guarantee better quality (R. 47-49). A meeting was arranged for later that evening at the restaurant in the

Bronx. However, that evening when they met, Altimari said that they could not get the "stuff", because there were too many policemen in the area (R. 51-53).

The court of appeals held that the evidence showed sufficient dominion and control by petitioner over the narcotics sold on February 4 to render applicable to him the statutory presumption arising from possession.

ARGUMENT

Petitioner concedes that constructive possession of narcotics is sufficient to bring into play the statutory presumption of knowledge that they were illegally imported, but argues that the evidence in this case does not permit an inference of control to establish such possession (Pet. 7). That petitioner controlled the disposition of the narcotics was, however, amply established by the evidence as to the events at the time of the sale. Petitioner was waiting with his co-conspirators at the appointed place and time for the delivery of the narcotics. After the other co-conspirators joined Brown in the parking lot, one of them returned briefly to where petitioner was standing and then returned to the parking lot with the narcotics in a paper bag. The inference was compelling that he obtained the narcotics from petitioner, who not only had immediate control of the narcotics but had them in his actual possession. That inference was reinforced by subsequent events when, in response to the agent-purchaser's complaints about the quality of the first delivery, petitioner promised that the next delivery would be of better quality.

In short, the evidence showed not only participation in the sale, but subsequent a knowledgment by petitioner of such participation. The question as to the significance of the aider and abettor statute, 18 U.S.C. 2, as to which the Court of Appeals for the Second Circuit recently divided in *Santore, et al.* v. *United States* (November 16, 1960), certiorari denied, Nos. 15, 16, 17, 648, 5 Misc., 6 Misc., 635 Misc., this Term, March 6, 1961, is thus not presented by this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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